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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO HILARIO, Defendant and Appellant.	B250337 (Los Angeles County Super. Ct. No. BA402144)

APPEAL from a judgment of the Superior Court of Los Angeles County, Clifford L. Klein, Judge. Affirmed.

Caroline R. Hahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., Stephanie A. Miyoshi and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Francisco Hilario challenges his conviction on one count of robbery. He claims that because he did not personally take property from the victim, his conviction must have been based on an aiding and abetting theory of liability. Hilario accordingly contends that the trial court erred in not instructing the jury on an aiding and abetting theory of liability. He further contends that the evidence was insufficient to support a conviction even under an aiding and abetting theory because "there is no evidence appellant knew beforehand about the robbery or that he shared an intent to commit it" with his co-defendant. We conclude that even if the trial court erred in failing to provide an aiding and abetting instruction, any error was harmless. We further conclude that the evidence was sufficient to support Hilario's conviction. The judgment of the trial court is affirmed.

PROCEDURAL HISTORY

On January 10, 2013, the District Attorney of the County of Los Angeles ("the People") filed a two-count information against Jose Enriquez and Appellant Francisco Hilario. Count 1 alleged that Hilario and Enriquez committed second-degree robbery (Pen. Code § 211)[1] against victim Juan Quinones[2] on September 3, 2012. Count 2 alleged that Hilario alone had attempted to commit robbery (§§ 211 & 664) against a second victim, Arnoldo Rodriguez, earlier that the same day. The information further alleged that Hilario had served one prior prison term within the meaning of section 667.5, subdivision (b).

Hilario and Enriquez pleaded not guilty to the charges and proceeded to a joint jury trial. The jury found Hilario guilty of the robbery of Quinones alleged in Count 1

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[1] All further undesignated statutory references are to the Penal Code.

[2] The record spells the victim's name as both "Quinones" and "Quinonez." We have used "Quinones" because it is the more prevalent of the two and because it is the spelling provided via the interpreter at both the preliminary hearing and the trial.

but was unable to reach a verdict as to the attempted robbery of Rodriguez alleged in Count 2. The trial court declared a mistrial as to Count 2, which the People later dropped in exchange for Hiliario's no contest plea to Count 3, an interlineated charge of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)). Hilario waived the right to jury trial on the prior prison term allegation and admitted that the allegation was true.

The trial court sentenced Hilario to a total of four years in state prison: a midterm three-year sentence on Count 1, a concurrent midterm three-year sentence on Count 3, and an additional year for the prior prison term enhancement. The court awarded Hilario 327 days of presentence custody credit, composed of 285 days of actual custody credit and 42 days of conduct credit. Hilario timely appealed.

FACTUAL BACKGROUND

I. The People's Case

A. The Rodriguez Incident

Arnoldo Rodriguez testified that at about 7:00 p.m. on September 3, 2012, he went to Shawn's Liquor Store in the 6000 block of South Avalon Boulevard. He saw Hilario standing at a bus stop outside the store, with a cast on one of his arms. Rodriguez had seen Hilario there a few times over the past few months, but denied knowing him or his cousin. As Rodriguez approached the store, the two men shook hands and Hilario asked Rodriguez if he could borrow Rodriguez's phone. Rodriguez refused the request, prompting a brief verbal argument between himself and Hilario. Rodriguez offered conflicting testimony about the degree to which the verbal altercation escalated into a physical one, but conceded on cross-examination that Hilario did not try to remove the phone from his pocket. Eventually Rodriguez entered the liquor store, and Hilario remained outside.

When Rodriguez emerged from the liquor store a minute or so later, Hilario punched him in the face a few times. Rodriguez fell to the ground and briefly lost

consciousness – but not his phone, which remained in his pocket. After regaining consciousness, Rodriguez went into the liquor store and called the police. The police presented Rodriguez with a photo array on October 1, 2012, and he identified Hilario as the man who attacked him.

The People played a video recording of the attack for the jury. They also presented a rebuttal witness, Los Angeles police detective Guillermo Medina, who testified as to the creation and accuracy of the video. Neither the video nor any of the other exhibits admitted at trial are in the appellate record.

B. The Quinones Incident

Quinones testified that he and a friend consumed a few beers at his house on the evening of September 3, 2012. When the duo ran out of beer, Quinones put about $5 in his pocket and rode his bicycle to Blimp Liquor Store, near the intersection of Florence and Central Avenues, to purchase more beer. As Quinones pulled up the store, two Hispanic males tried to "draw [his] attention." Quinones recognized one of them as Hilario, whom he had seen in the area almost every day for about a month. Hilario and the other man asked Quinones for money and tried to lure him into the store's parking lot, where it was "kind of hidden." Quinones was able to evade them and enter the liquor store after only a short interaction.

After purchasing two forty-ounce beers, Quinones got back on his bicycle and started riding home. Quinones soon realized that the two men from outside the liquor store were following him on their own bicycles. One of them pulled up behind Quinones while the other cut across the sidewalk to block Quinones's way. Hilario, who had pulled up behind Quinones, knocked Quinones off his bicycle. Hilario then punched Quinones in the head and face approximately ten times, causing him to lose consciousness "for a matter of seconds," while the other assailant rifled through his pockets and took his wallet. Hilario and the other assailant then fled quickly, in the same direction, on bicycles. Quinones testified that although he did not think that the assailants had his bicycle at that time, he did not have the bicycle with him.

Quinones got up and walked home. His niece promptly called the police. Quinones told the police that someone had punched him and taken his bicycle. Quinones testified that at that time, he thought that the assailants had taken the bicycle. About ten to fifteen minutes later, Quinones got a call from the police, who told him they had detained a suspect. Both of the responding officers, Guillermo Calleros and Nickolas Lokker, testified that they came upon the suspect on foot near the liquor store and found Quinones's wallet in his pocket during a pat-down. Quinones's niece drove him back to the scene, about two blocks from the liquor store. When Quinones arrived, the police removed Enriquez from the back of a squad car. Quinones identified Enriquez as the man who had taken his wallet, though he was unable to identify him at the trial. (Calleros and Lokker positively identified Enriquez, however.) The police returned Quinones's wallet and its contents, two identification cards, to him on the scene. Quinones testified that his bicycle was gone when he left the house with his niece, but that he did not know what had happened to it.

A short time later, the police spotted a Hispanic man with a bicycle near the Blimp Liquor Store. Lokker testified that the man had some laundry bags with him; Calleros could not remember whether the man had any large bags of laundry with him, even after counsel refreshed his recollection with testimony that Lokker gave at Hilario's preliminary hearing. The police detained the man, who had a cast on his arm, and placed a call to Quinones. The police told Quinones that they had located a second suspect.

Quinones's niece drove Quinones to the location where the police had detained the second suspect. Quinones became "livid" as soon as he saw the suspect, whom he identified as Hilario and "the one that took [his] bicycle." The bicycle Hilario had with him at the time of his apprehension did not belong to Quinones, however. Quinones's bicycle never was recovered or returned to him.

II. The Defense Cases

A. Enriquez

Enriquez declined to testify. His defense consisted solely of expert testimony from Dr. Kathy Pezdek, a cognitive scientist and psychology professor who researches eyewitness memory and identification. Pezdek testified about several psychological factors that can cast doubt on the accuracy of eyewitness identifications. These factors included distance and lighting, alcohol consumption, distraction during the incident, cross-race identification, and time delay. Pezdek did not directly opine on the effects, if any, these factors may have had on Quinones's identification of Enriquez.

B. Hilario

Hilario took the stand in his own defense. As to the Rodriguez incident, he testified that Rodriguez approached him in a threatening manner before entering Shawn's Liquor Store on September 3, 2012. Hilario further testified that Rodriguez told him that he was looking for Hilario's cousin to settle some business. When Rodriguez emerged from the liquor store with his purchase, he made threatening queries about Hilario's cousin. Rodriguez also reached into his pocket in a threatening fashion. Hilario responded by punching Rodriguez about three times. Hilario made no attempt to search Rodriguez's pockets. Hilario also denied asking Rodriguez for his cell phone.

Hilario testified that he was arrested later that night while he was on his way home from the laundromat with a large bag of laundry. He was walking his bicycle because he could not ride the bicycle and carry his laundry at the same time. The police accused him of participating in a robbery, which he denied. When Quinones arrived on the scene, however, he identified Hilario as the perpetrator. Hilario testified that he had seen Quinones around the neighborhood but did not know him beyond that. Hilario denied following Quinones, knocking him from his bicycle, hitting him, or trying to take his bicycle or other possessions.

Hilario also denied knowing Enriquez or ever having met him in his life.

III. Closing Arguments

A. The People

At closing, the People argued that their video of the Rodriguez incident showed Hilario "patting down or searching the victim's pockets." They also emphasized Rodriguez's testimony that Hilario asked him for his cell phone, as well as "the force of using the punch."

With respect to the Quinones incident, the People argued that its proximity and similarity to the Rodriguez incident suggested a pattern of behavior by Hilario. They also urged the jury to credit Quinones's testimony despite his consumption of alcohol prior to the incident and other potentially applicable factors identified by expert witness Pezdek, and to consider Pezdek's potential biases. The People contended that Enriquez was found with Quinones's wallet, near the liquor store, and was immediately identified by Quinones. They also noted that Quinones "specifically identified one person as doing the striking and the punching, and the other person as the one who took the wallet." The People did not mention Quinones's bicycle.

B. The Defense

Enriquez argued that Quinones was mistaken as to his identity. He emphasized Quinones's inability to identify him in court, as well as Quinones's failure to remember his distinctive tattoos and facial hair. Enriquez further pointed out that he was not found on or with a bicycle, and contended that he had the wallet in his pocket because he had recovered it after observing – not participating in –a robbery.

In his closing, Hilario contended that the video of the Rodriguez incident vindicated his testimony about the event. He conceded that the punching did not make him look good, but argued that the video did not depict him attempting to take anything from Rodriguez, even after Rodriguez lost consciousness. With respect to the Quinones incident, Hilario pointed out inconsistencies in Quinones's testimony. He also pointed out that the fate of Quinones's bicycle remained a mystery. Hilario further suggested that the police's shoddy investigative work tainted the identification process. Hilario also

emphasized that no physical evidence tied him to Quinones's wallet, and reiterated his assertion that he had been doing laundry at the time of the incident.

C. Rebuttal

On rebuttal, the People argued that Quinones's testimony concerning the incident undermined Hilario's contention that Enriquez was a stranger to him. The People also argued that the law holds Enriquez and Hilario "both equally responsible" for the Quinones incident, such that "Defendant Hilario is guilty of the robbery of Juan Quinones, and the Defendant Enriquez is also guilty for the taking of the wallet and the robbery of . . . Juan Quinones." Specifically, the People asserted that Enriquez "was involved in the robbery and did the actual taking of the robbery. And even though he didn't throw a punch or the evidence suggested he didn't throw a punch, he is still personally reliable [*sic*] for the actual robbery." The People did not expressly invert this contention to suggest that Hilario should be held equally accountable for the robbery even if he only threw punches and did not actually take the wallet. The People again made no mention of Quinones's bicycle.

DISCUSSION

I. Jury Instructions

Hilario contends that the trial court committed reversible error by failing to sua sponte instruct the jury on an aiding and abetting theory. Hilario did not request an aiding and abetting instruction during trial, but now argues that such an instruction was necessary because there was no evidence that he personally took property from Quinones. He contends that the error was prejudicial because the jury could have concluded that he lacked knowledge of the second assailant's plan to rob Quinones and did not intend to assist him.

Claims of instructional error present questions of law that we review de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.) If we conclude that an error has been committed, we must inquire whether the error prejudiced Hilario. Generally, we "assess

prejudice from the court's failure to instruct on accomplice liability principles under the state error standard of *People v. Watson* [(1956)] 46 Cal.2d [818,] 836." (*People v. Delgado* (2013) 56 Cal.4th 480, 492 (*Delgado*).) That is, "we ask whether, considering the entire record, there was any reasonable probability of a more favorable result had such instructions been given." (*Ibid.*) However, the omission of an aiding and abetting instruction may constitute a violation of a defendant's federal due process rights if it was tantamount to the omission of an element of the charged offense or "[i]f the conceptual gap so created was likely to be filled in a manner that reduced the People's burden of proof. . . ." (*Id.* at p. 491.) "As with an ambiguous instruction, we ask whether there is a reasonable likelihood [citation] that the jury applied the instructions in a manner that deprived defendant of his constitutional rights." (*Ibid.*) If so, the People must prove that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 36.)

Trial courts must instruct the jury on "general legal principles raised by the evidence and necessary for the jury's understanding of the case," even if a defendant fails to request a particular instruction. (*Delgado*, *supra*, 56 Cal.4th at p. 488 [quotation omitted]). The general legal principle of aiding and abetting provides that a defendant may be found guilty as a principal to a crime if he "(i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime" (*Id.* at p. 486, quoting *People v. Cooper* (1991) 53 Cal.3d 1158, 1164; see also § 31.) "[I]nstructions delineating an aiding and abetting theory of liability must be given when such derivative culpability 'form[s] a part of the prosecution's theory of criminal liability and substantial evidence supports the theory.'" (*Delgado*, *supra*, at p. 488, quoting *People v. Prettyman* (1996) 14 Cal.4th 248, 266-267.) Aiding and abetting instructions are not required, however, "where '[t]he defendant was not tried as an aider and abettor, [and] there was no evidence

to support such a theory.'" (*People v. Young* (2005) 34 Cal.4th 1149, 1201, quoting *People v. Sassounian* (1986) 182 Cal.App.3d 361, 404.)

Hilario contends that he must have been tried as an aider and abettor because he did not personally take property from Quinones. This argument finds some support in *Delgado*, which our Supreme Court decided a few weeks after Hilario's trial. There, our Supreme Court explained that "[i]f the evidence does not show the defendant's personal conduct satisfied one of the elements [of the charged crime], the defendant's guilt must rest in that respect on his or her derivative liability, as a coconspirator or an aider and abettor, for another's conduct." (*Delgado*, *supra*, 56 Cal.4th at 489.) However, the offense at issue in *Delgado*, kidnapping for purposes of robbery (§ 209, subd. (b)(1)), contains "more than one act element," and the *Delgado* court specifically noted that the "nuanced" and "realistic approach" to aiding and abetting liability it set forth is designed to "take account of the fact that when an offense contains more than one act element, the People must establish the defendant's liability for conduct meeting *all* such elements." (*Delgado*, *supra*, 56 Cal.4th at p. 489.) The simple robbery of which Hilario was convicted requires only one act element: "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211; see *People v. Gomez* (2008) 43 Cal.4th 249, 261 ["Under the language of section 211, the phrases 'person or immediate presence' and 'force or fear' both refer to the 'taking' of personal property."].) Furthermore, it is well established that a defendant need not take actual manual possession of the victim's property to complete a robbery. (See 2 Witkin & Epstein, California Criminal Law (4th ed. 2012), § 96 [collecting cases dating back to 1947].) Thus, it is not immediately clear that *Delgado* is controlling here.

Even if it is, and the trial court did err by failing to sua sponte deliver an aiding and abetting instruction, reversal is not required. Just as in *Delgado*, the jury was fully instructed on all of the elements of the charged crime, "as well as on the People's burden of proof beyond a reasonable doubt, and the principle that as to each offense the People

must prove the defendant committed the prohibited act or acts with the intent or mental state required. None of the court's instructions suggested the People did not need to prove an element if the evidence showed another person's conduct satisfied that element." (*Delgado*, *supra*, 56 Cal.4th at 489-490.) The trial court's accurate instructions did not give the jury an incomplete picture of aiding and abetting liability, as Hilario suggests. (*Id.* at p. 490.) Instead, they were silent as to aiding and abetting. (*Ibid.*) But any resultant "conceptual gap" was not reasonably likely to be filled in such a way as to reduce the People's burden of proof (*id.* at p. 491),which for purposes of aiding and abetting liability requires the People to demonstrate that the defendant knew of and shared the perpetrator's intent to commit the crime and intended to facilitate the commission. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) The only reference to derivative liability that the People made at trial, during their rebuttal argument, was that the law holds both assailants "equally responsible" for the robbery even though one of the assailants did not hit Quinones. This assertion is "not one that would lead the jury to apply a standard less than that required by law." (*Delgado*, *supra*, 56 Cal.4th at 491.) "[T]his [assertion] suggests the kind of shared intent necessary to aiding and abetting" (*ibid.*), particularly when coupled with the "strong circumstantial evidence defendant and the [second assailant] were working together. . . ." (*Id.* at p. 492.).

Moreover, "[f]or the jury to find defendant guilty of [robbery], on the evidence before it, without finding either that he personally [took the victim's property] or that he harbored the requisite mental state to be indirectly liable for the [second assailant's taking], would verge on the irrational." (*Ibid.*) Quinones, whose testimony the jury clearly credited, testified that his bicycle was missing when the confrontation was over, and Calleros testified that Quinones identified Hilario as "the one that took [his] bicycle." "'[T]he commission of a robbery is sufficiently established by proof that the victim had valuables on his person at the time of being assaulted, beaten, and rendered unconscious, and that they were missing when he regained consciousness.'" (*People v. Hubler* (1951) 102 Cal.App.2d 689, 695.) Thus, the circumstantial evidence that Quinones never found

his bicycle after the incident alone would be sufficient to establish Hilario's guilt. But even if we were to discount Quinones's somewhat muddled testimony about his bicycle, it would have been eminently reasonable for the jury to infer from the facts adduced at trial that Hilario acted with the intent to divest Quinones of his wallet or other personal possessions. Quinones testified that two individuals, one of whom he consistently identified as Hilario, jointly asked him for money, jointly followed him mere minutes after he refused, and jointly accosted him. The only reasonable inference a jury could draw from this evidence is that the two individuals were working together and shared the specific intent to take Quinones's property. (See *People v. Beeman*, *supra*, 35 Cal.3d at p. 560.) It is highly unlikely that the jury would have reached a contrary conclusion had it received an aiding and abetting instruction.

In any event, "'it is hard to imagine how an aiding and abetting instruction would have helped [defendant], as it would have merely offered an alternative, additional means of establishing [the taking of property] without having to prove [defendant] took part in'" the taking. (*Delgado*, *supra*, 56 Cal.4th at p. 492.) Had such an instruction been given, defense counsel would have been limited to making the alibi argument it unsuccessfully advanced, or to arguing that Hilario inadvertently or unintentionally assisted the second assailant in taking Quinones's property. The jury apparently rejected the former on credibility grounds, and the latter is "an argument that would have been unlikely to persuade the jury given the strong circumstantial evidence defendant and the [second assailant] were working together" to confront, follow, restrain, and rob Quinones. (*Ibid.*; see also *id.* at p. 487.)

II. Sufficiency of the Evidence to Support the Conviction

Hilario also contends that his conviction must be reversed because the evidence does not support a finding as to every fact required for conviction beyond a reasonable doubt. Hilario specifically challenges the sufficiency of the evidence as to his specific intent to rob Quinones.

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence – that is, evidence that is reasonable, credible, and of solid value – from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Edwards* (2013) 57 Cal.4th 658, 715, quoting *People v. Lindberg* (2008) 45 Cal.4th 1, 27.) We consider "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) In making this determination, we presume the existence of every fact the jury reasonably could deduce from the evidence presented. (*People v. Edwards*, *supra*, 57 Cal.4th at 715.) If the jury's determinations are supported by reasonable inferences from the evidence, the fact that the circumstances might have supported a contrary finding does not render the findings unsupported or warrant reversal of the judgment. (*People v. Abilez* (2007) 41 Cal.4th 472, 504.) We do not resolve credibility issues or evidentiary conflicts; we look for substantial evidence. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

The jury convicted Hilario of one count of robbery. As already noted, "[r]obbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) Specific intent to permanently deprive the owner of his or her property is a necessary element of the crime (*People v. Anderson* (2011) 51 Cal.4th 989, 1002), and therefore also must be shared by an individual aiding and abetting a robbery. (*People v. Ogg* (2013) 219 Cal.App.4th 173, 180.) A defendant "shares the specific intent of the perpetrator if he or she 'knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime.'" (*Ibid.*, quoting *Beeman*, *supra*, 35 Cal.3d at 560.) Hilario contends that his conviction must have rested upon a theory of aiding and abetting the perpetrator who took the wallet, and that "there is no direct evidence of (1) appellant's

knowledge of [the perpetrator's] unlawful purpose to rob, and (2) appellant's shared intent in facilitating the commission of the offense." We disagree.

Direct evidence is not required to prove intent or any other element of the crime. (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.) Specific intent may be proved through circumstantial evidence (*People v. Lewis* (2001) 25 Cal.4th 610, 643), and factors such as presence at the scene, companionship, conduct before and after the offense, and flight may be considered in determining a defendant's criminal responsibility for the acts of another. (*People v. Garcia* (2008) 168 Cal.App.4th 261, 273.) Quinones testified that two men – Hilario and the other assailant – asked him for money outside the liquor store together, followed him together, used their bicycles to cut him off together, knocked him off his bike together, hit him and stole from him simultaneously, and departed the scene together, headed in the same direction. The jury could have credited this testimony and concluded from it that Hilario knew of the second assailant's criminal purpose and promoted, encouraged, or facilitated it by cutting off Quinones and punching him during the actual theft of Quinones's wallet. (*See People v. Francis* (1969) 71 Cal.2d 66, 72). To the extent that Hilario points to his own testimony that he did not know Enriquez and was doing laundry during the incident, he raises only a credibility dispute that is beyond our purview at this juncture. (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 357.) Hilario asserts that he did not encourage the second assailant because he did not "utter words of encouragement" to him , but his actions in beating Quinones while the wallet was being taken speak louder than any words of encouragement could. (*Cf. Delgado, supra,* 56 Cal.4th at p. 487 [giving as an example of aiding and abetting conduct, "one person might restrain the victim while the other does the stabbing"].)

We are satisfied that there was sufficient evidence of Hilario's intent to convict him under an aiding and abetting theory, the only one under which he asserts that he could have been convicted.

DISPOSITION

The judgment of the trial court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.